

Automatic Stay - Rental Deposits

11 U.S.C. § 362(l)(1)

BR Act Section 311

This section adds a new exception to current automatic stay provisions regarding leases, as well as limitations to this new exception and remedial actions available to the debtor. This exception to the automatic stay applies to any eviction or similar proceeding against a debtor tenant if the landlord has obtained a judgment for possession of the leasehold prior to the date of the filing of the petition.

- I. Petition must indicate whether pre-petition judgment for possession has been obtained and may assert that a right to cure is available under state law (If the debtor only indicates the existence of a judgment for possession and claims no right to cure, see paragraph VII of this guidance);
- II. Debtor must deposit, with the clerk of the court, any rent that would become due during the 30-day period after the filing of the bankruptcy petition.

Below are three options for courts in handling the rent and its transmittal to the lessor.¹ Clerks should review these options with their judges and determine the court's approach. Upon selection, the court should adopt a general order setting out the court's procedure and any applicable deadlines (e.g., a time limit for the landlord's response).

Option 1:

1. With the petition, the Debtor must file with the clerk:
 - a certified or cashier's check or money order made payable to the lessor, and
 - a copy of the judgment for possession.
2. The clerk logs² the check and either images it or makes a hard copy.
3. The clerk confirms that the check is made payable to the party listed on the petition and then transmits (e.g., by mail, certified

¹ These options have been approved in principle by the Accounting Division of the Administrative Office. Courts needing advice on a particular procedure should contact the Accounting Division for specific guidance.

² With respect to the log for the checks, courts should be mindful of audit procedures and ensure that there is a segregation of duties and a complete audit trail for the check. For example, the check should be mailed by a person other than the clerk who received the check, and the log should include a column for 'date mailed' and 'by whom mailed'.

with return receipt requested) check to the lessor.³

Option 2:

1. With the petition, the Debtor must file with the clerk:
 - a certified or cashier's check or money order made payable to the lessor, and
 - a copy of the judgment for possession.
2. Clerk's office logs check and makes hard copy of check or images check. Clerk's office places check in safe.
3. Clerk's office sends notice to lessor with option for lessor to either⁴, within the time designated by the court:
 - consent to receive the check (lessor will give payment instructions, i.e. mail check to lessor or lessor's representative/attorney), or
 - object to the debtor's certification. A hearing will then be set to address the lessor's objection.

Option 3:⁵

1. With the petition, the Debtor must file with the clerk:
 - a certified or cashier's check or money order made payable to the court, and
 - a copy of the judgment for possession.
2. Clerk deposits check into the Deposit Fund (fund code 6855TT). The court can then either:
 - Complete a payment voucher in FAST or FINSYS

³ The check should be mailed to the lessor at the address listed on the debtor's certification or the petition.

⁴ It is suggested that the notice include a statement that if the lessor does not respond within the deadline set by the court, the court will deem the lack of response as acceptance, and will send the check to the lessor at the address set forth in the debtor's certification.

⁵ Courts considering which process to implement should be aware that this approach has drawbacks. For example, under this procedure, the clerk must certify to the district court that payment to the lessor is "legal, proper and correct," so certifying officer liability is implicated. In addition, in order to ensure that the check is paid to the proper person, the clerk would need to require the debtor to include the lessor's social security number or employer identification number.

requesting that the district court clerk issue a check payable to the lessor (as provided by the debtor and listed on the judgment),⁶ OR

- Follow the notice procedures set out in Option 2, above.

III. As required by 11 U.S.C. § 362(l)(1), the debtor must file with the petition and serve upon the lessor a certification under penalty of perjury. The debtor can satisfy this obligation by either option outlined below.

A. The debtor may file and serve on the lessor the first required certification indicating the following:

- that a pre-petition judgment was obtained;
- that the debtor would be permitted to cure, under applicable non-bankruptcy law (i.e., state landlord-tenant law), the entire monetary default which gave rise to the judgment for possession; and
- the debtor (or an adult dependent of the debtor) has deposited with the clerk of the court, any rent that would become due during the 30-day period subsequent to the filing of the bankruptcy petition

The debtor must file the proof of service for this certification with the court.

B. The debtor may also satisfy the requirements of 11 U.S.C. § 362(l)(1) by completing all three check boxes listed on the voluntary petition under the “Statement by a Debtor who Resides as a Tenant of Residential Property” section. The debtor must serve a copy of the petition on the lessor and file the proof of service with the court.

IV. Second Required Certification of Debtor under 11 U.S.C. § 362 (l)(2).

I. Within 30 days of filing of the petition, the debtor (or an adult dependent of the debtor), must file with the court and serve on the lessor a certification, indicating:

- i. that the debtor has cured, under applicable non-bankruptcy law, the entire default at issue.

V. If the lessor files an objection to either certification, the court shall hold a hearing, within 10 days of the filing and service of such objection, to determine the veracity of the certification(s).

⁶ Courts may locally decide to require a court order before the funds can be transmitted. However, the Office of General Counsel has opined that a court order is not required for the clerk to disburse the rent deposits received under 11 U.S.C. § 362(l)(1)(B).

- VI. If the court upholds the lessor's objection, the clerk shall immediately serve a certified copy⁷ of the court's order on the lessor and the debtor⁸.
- VII. If the debtor fails to file either certification (1) or (2), the clerk shall "immediately" serve upon the lessor and the debtor a certified copy of the docket indicating the absence of a filed certification and the applicability of the exception to the stay under subsection (b)(22).
 - A. If the debtor indicates on the petition that a judgment has been obtained but fails to either:
 - (1) indicate that debtor would be permitted to cure the entire monetary default which gave rise to the judgment for possession or
 - (2) deposit with the clerk any rent that would become due during the 30-day period subsequent to the filing of the bankruptcy petition,

Then the court would follow the procedure outlined above in this section VII.

⁷ Although there is normally a charge for certifications, no charge should be imposed in this instance, as the certification is required by statute, not at the request of a party, as is typically done.

⁸ The Bankruptcy Reform Working Group is of the opinion that "serve" in these provisions means "give notice of" – the court does not effect service in the same manner as parties. In addition, although the copy must be certified, the clerk should not impose a fee for the certification, as it is not on request of the debtor, but rather, must be done pursuant to the statute.